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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

KUNSTSAMMLUNGEN ZU WEIMAR,

Petitioner,

—against—

FEDERAL REPUBLIC OF GERMANY, EDWARD I. ELICOFON and ELISABETH MATHILDE ISIDORE ERBGROSSHERZOGIN VON SACHSEN-WEIMAR-EISENACH (Grand Duchess of Saxony-Weimar),

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Kunstsammlungen zu Weimar ("Kunstsammlungen"), prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit entered on April 25, 1973.

Opinion Below

The opinion of the court of appeals is reported at 478 F.2d 231, and is printed herein as Appendix B. The district court wrote two opinions: one on June 25, 1970, the second on September 25, 1972; both are reported at 358 F.Supp. 747, and are printed as Appendix C.

Jurisdiction

The judgment of the court of appeals was entered on April 25, 1973. A petition for rehearing and a suggestion for rehearing in banc were denied by orders dated June 18, 1973 (Appendix D). This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

Questions Presented

The ultimate issue is whether the courts below erred in holding that, because of its relationship to the government of the German Democratic Republic ("the GDR government"), which has not yet been recognized by the executive branch, Kunstsammlungen, an East German corporate entity, may not sue in our courts to recover two Duerer paintings to which it claims title and which were stolen in 1945 from a castle in East Germany where they had been deposited for safekeeping during World War II.

Determination of that issue presents the following questions:

1. Whether the fact that the GDR government has not yet been recognized would prevent it from suing to recover the Duerer paintings were it the plaintiff asserting a claim on its own behalf.

2. If so, whether Kunstsammlungen, because of its relationship to the GDR government, also may not sue.

3. Whether the 1923 Treaty of Friendship, Commerce and Consular Rights between the United States and Germany, which the executive declared was still effective as to the area of East Germany, required that Kunstsammlungen be accorded access to the courts of the United States.

4. Whether the executive's position that the government of the Union of Soviet Socialist Republics ("the USSR government") was the sovereign power in East Germany and the GDR government merely its agent, required that the courts hold that Kunstsammlungen, even if found to be an "arm and agency" of the GDR government, was an instrumentality of the recognized USSR government and thus not precluded from suing.

Constitutional Provisions and Treaty Involved

This case involves Article II, section 2 and the Fifth Amendment of the Constitution, and Article XII of the Treaty of Friendship, Commerce and Consular Rights between the United States and Germany, December 8, 1923, 44 Stat. 2132 (1927), T.S. No. 725. The treaty provisions are printed as Appendix A.

Statement

These actions involve two very valuable paintings executed by the great German painter and engraver, Albrecht Duerer. For many years before World War II, these paintings were contained in the Staatliche Kunstsammlungen zu Weimar ("the Weimar Museum") art collections, located in Weimar, a city of the then Land (State) of Thueringen (Thuringia), Germany. During the War, the paintings were deposited for safekeeping in a castle in the neighboring town of Schwarzburg. In June 1945, while the United States Army was occupying the Schwarzburg castle, the paintings were stolen. Efforts to locate them proved futile until 1966, when they were found in the possession of respondent Edward I. Elicofon ("Elicofon").

The Prior Proceedings

In January 1969, the government of the Federal Republic of Germany ("the FRG government") commenced an action to recover the paintings in the District Court for the Eastern District of New York. Its complaint alleged that since 1824, the Duerer paintings had been part of an art collection in Weimar, which was continued after 1921 as the Weimar Museum; that they were exhibited there until 1945; that they were removed for safekeeping to the Schwarzburg castle; that while stored there and during the United States occupation, they were stolen; that they were then the property of the Weimar Museum, which belonged to the State of Thuringia, one of the federal states of the German Reich; that Elicofon acquired them from the thief; and that Elicofon has neither title to nor right to possess them. The FRG government claimed that it was "the only lawful and recognized successor" to the German Reich, "the only government which may represent the German people" and the only party "properly entitled to the immediate custody and possession of the Duerer Paintings".[1] It asked that Elicofon be directed to deliver the paintings to it.

In March 1969, the Grand Duchess of Saxony-Weimar intervened, claiming ownership of the paintings by assignment from the Grand Duke, who she alleged had acquired full rights to the paintings when, in 1945, he terminated an earlier settlement agreement under which the Weimar Museum was granted the right to exhibit them. The Grand Duchess asked that Elicofon be directed to deliver the paintings to her.

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[1] The FRG government also claimed that it adequately represented the interests of Kunstsammlungen in the action. The courts below did not pass on that claim.

In April 1969, Kunstsammlungen moved for leave to intervene, as of right, as a party plaintiff. Its proposed intervenor complaint alleged that it was the successor to the Weimar Museum, which was in possession of the paintings when they were stolen, and was entitled to their return. The other parties opposed its intervention, contending that whatever the rights of Kunstsammlungen it could not sue in our courts because it was an instrumentality of the unrecognized GDR government.

Kunstsammlungen also commenced a separate action against Elicofon for return of the paintings. Elicofon moved to dismiss the complaint in that action, again on the ground, *inter alia*, that Kunstsammlungen was an instrumentality of an unrecognized government and therefore could not sue.

In July 1969, the United States Attorney for the Eastern District of New York filed a "Suggestion of Interest" in the FRG government action, submitting, at the request of the State Department, the following "views of the Executive Branch": (1) the United States government does not recognize the East German regime; (2) it recognizes the FRG government "as the only German Government entitled to speak for Germany as the representative of the German people in international affairs"; and (3) it recognizes the FRG government as "entitled in this litigation to represent the Weimar Museum as trustee of its interests".

The district court, in a memorandum of decision of June 25, 1970 (Appendix C, *infra*, pp. 6a-11a), ruled that the unrecognized GDR government would not have been permitted to sue in an action like this one and that if it were found that Kunstsammlungen was "an arm or instrumentality of the G.D.R." it too would be barred from suing to recover the paintings. The court was not prepared to determine Kunstsammlungen's right to sue on affidavits alone

and therefore directed that a hearing be held on its relationship to the GDR government. Depositions were then taken overseas, of a director of the former Weimar Museum, the director of Kunstsammlungen, and two experts on East German law; another expert on East German law (an employee of the FRG government) testified in open court in New York.

On September 25, 1972, the district court, in a second, supplemental opinion (Appendix C, *infra*, pp. 11a-17a), held that Kunstsammlungen's relationship to the GDR government was such as to constitute it its "arm and agency", and that therefore it could not sue to recover the paintings. The court entered an order denying Kunstsammlungen's motion to intervene in the FRG government action and directed judgment dismissing the complaint in the Kunstsammlungen action.

On appeal to the Court of Appeals for the Second Circuit, the order and judgment of the district court were affirmed per curiam "for the reasons given" in the district court's opinions (Appendix B, *infra*, pp. 2a-5a). A petition for rehearing and suggestion for rehearing in banc were denied on June 18, 1973 (Appendix D, *infra*, pp. 18a-19a).

The Nature of Kunstsammlungen's Claim to the Paintings

Kunstsammlungen is a legal entity, whose status as "juristic person" was established by order of the Minister of Culture of the GDR government dated April 14, 1969, and made effective as of January 1, 1969. It acts, in legal and other matters, through its director and in accordance with by-laws promulgated by the director.[2] It holds and administers the palaces, museums, buildings, and collections of paintings and art objects located in Weimar (in

[2] The by-laws of Kunstsammlungen are appended to the district court's opinion of September 25, 1972, *infra*, pp. 15a-17a.

East Germany) which before 1969 comprised the properties of the Weimar Museum.

Prior to World War I, the then Grand Duke of Saxony-Weimar-Eisenach was in possession of these properties. In 1919, shortly after he abdicated, the properties (including the Duerer paintings) were transferred to the District of Weimar, and in 1923 they came into the possession of the newly established State of Thuringia, one of the States of the then German Republic.

From that time until the Hitler period, possession remained in the State of Thuringia. There is some question whether that State continued to own the museum properties during the Third Reich period of centralization of governmental authority, but clearly after the surrender of Germany and the accession of the Allied occupation authorities in 1945 the properties again came into the possession of the State of Thuringia. They remained in its possession even after the German Democratic Republic was established in 1949 (with Thuringia as one of the constituent States). In 1952, however, the States in East Germany were abolished as political subdivisions, and Thuringia was subdivided into three Bezirke (Counties) and thirty-six Kreise (Districts). Possession of Thuringia's properties was thereupon transferred to the various towns and villages of the State, and the museum properties now came into the possession of the City of Weimar, one of the newly created urban Districts in the County of Erfurt.

Thus, the art collections in Weimar were at all times held and administered by the local authorities, rather than by the central government authorities in Berlin. When Kunstsammlungen was established as a discrete legal entity, effective as of January 1, 1969, the rights and obligations incidental to the possession and administration of the museum properties passed to Kunstsammlungen.

REASONS FOR GRANTING THE WRIT

I

The holding that Kunstsammlungen may not sue to recover the stolen Duerer paintings because of its relationship to the unrecognized GDR government presents important questions of federal law which have not been and should be settled by this Court.

The courts below accepted as established doctrine that a foreign government not yet formally recognized by the executive branch of our government may not sue in our courts. Then, finding that Kunstsammlungen was closely related to the unrecognized GDR government, they held that that entity too might not sue, even to recover the Duerer paintings which had been stolen while the United States Army was in occupation of Weimar at the end of World War II.

The questions of federal law presented by this holding unquestionably are of great importance and have not been, but should be, settled by this Court.[3] It is moreover sig-

[3] The opinion of Mr. Justice Stone in *Guaranty Trust Co.* v. *United States,* 304 U.S. 126 (1938) stated, in passing, that "[i]t is not denied that, in conformity to generally accepted principles, the Soviet Government could not maintain suit in our courts before its recognition by the political department of the Government." (at 137) But, as that *dictum* indicates, the rule was not put in issue in the case. It was unnecessary to the Court's holding to inquire into or evaluate the "accepted principles" referred to, and the Court in fact did not do so. Moreover, the State Department had recognized another government, the exiled Provisional [Kerensky] Government, as the legitimate sovereign for Russia (304 U.S. at 138), thus giving rise to a situation quite different from that in the present case, where the executive recognized no government for the area of East Germany (unless, as we unsuccessfully urged below, it did recognize the U.S.S.R. government as such). See, *infra,* pp. 13-14 and Point III.

nificant that in *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964), the Court suggested the need for consideration and resolution of these questions. Pointedly referring to the literature criticizing the "doctrine that nonrecognition precludes suit by the foreign government in every circumstance" and explicitly refraining from intimating any view "on the possibility of access by an unrecognized government to United States courts" (376 U.S. at 411, n. 12), the Court plainly evidenced a willingness to consider the doctrine. Falk, *The Complexity of Sabbatino*, 58 Am. J. Int'l. L. 935, 950, n. 49 (1964). The present case presents an excellent opportunity to do so.

The particular circumstances here especially warrant the grant of certiorari. The decisions below prevent a foreign national from obtaining any judicial determination of its rights to property stolen and transported to the United States, solely by reason of its relationship to a government not yet accorded formal recognition by our executive. Thus, "a unique sort of *res nullius*" is created, see Dickinson, *The Unrecognized Government or State in English and American Law*, 22 Mich. L. Rev. 118, 123-24 (1923), Borchard, *The Unrecognized Government in American Courts*, 26 Am. J. Int'l. L. 261, 267 (1932); a thief's "title" is substantially immunized from challenge in the courts; and grave questions of substantive due process are raised, cf. *Russian Volunteer Fleet* v. *U.S.*, 282 U.S. 481 (1931).

The decisions are wrong, and their error lies in the assumption that it is an invariable rule that until the executive branch recognizes a foreign government, the judicial branch may not accept that government (or a national closely related to it) as a plaintiff in any court and

in any case.[4] This assumption betrays a regrettable failure to apply a reasoned policy-oriented analysis to the problems posed when a nonrecognized government sues. On such an analysis, we submit, one finds no basis in policy or precedent for denying it the right to sue in circumstances such as are present here, where what is sought is a judicial determination of rights to property.

The justification usually advanced for preventing the unrecognized government from suing is that if the courts allowed it to do so, they would be compromising the policies underlying nonrecognition (policies seldom, if ever, articulated) and impeding the executive branch's exercise of its foreign affairs functions. Those fears we shall presently show are ephemeral at best. But even if they were real, one must be mindful also of the substantial interests in assuring to all persons, including foreign governments, a full opportunity to obtain judicial determination of their rights in the courts of the United States. A responsible exercise of the judicial function undoubtedly requires that these competing interests be evaluated and a serious effort made to reconcile or at least to accommodate them.

The courts below, however, failed to weigh the conflicting considerations or to attempt their reconciliation. Instead they deferred unquestioningly to the supposedly urgent demands of executive policy. They neither sought articulation of the specific policies which underlay the failure to recognize the GDR government or inquired to what extent, if at all, those policies would be impaired if, in the circum-

[4] Although, by way of footnote, the district court intimated that "special circumstances" might justify a departure from this rule where "action by the President can be interpreted as creating an exception to the rule" (*infra*, p. 10a), it applied the rule as an absolute prohibition against suit, and engaged in no inquiry as to whether there were "special circumstances" which warranted permitting Kunstsammlungen to sue to recover the paintings.

stances of this case, suit were permitted. They imposed an absolute prohibition against suit. In substance, the decisions below were a complete abdication in favor of the executive.

We do not question that the political branches are charged with the foreign affairs power, and that the courts should honor executive determinations in that area. But "it cannot, of course, be thought that 'every case or controversy which touches foreign relations lies beyond judicial cognizance' ". *Baker* v. *Carr*, 369 U.S. 186, 211 (1962). And it is our submission that in the circumstances of this case, and cases like it, an unrecognized government and its nationals should be permitted to sue because to do so would in no way impugn the executive's prerogative. For, when a *de facto* government prosecutes an action to recover property, its legitimacy as sovereign—the essence of recognition—is not put in issue at all. Thus, in such a case, there is no "possible incongruity" between the courts' accepting the government as a party, and the executive's refusing to grant it *de jure* recognition.

There is absolutely no logic in an absolute rule that bars an unrecognized government from the courts, whatever the nature of the action or the circumstances giving rise to it. Surely there is nothing talismanic in nonrecognition. It signifies merely the unwillingness of our executive branch for the time being to accept the foreign government as legitimate sovereign for the territory it governs. It certainly does not deny that the government exists and in fact controls the territory. See, *e.g.*, *Salimoff & Co.* v. *Standard Oil Co.*, 262 N.Y. 220, 227 (1933); *Russian Reinsurance Co.* v. *Stoddard*, 240 N.Y. 149 (1925); see generally Lubman, *The Unrecognized Government in American Courts: Upright* v. *Mercury Business Machines*, 62 Colum. L.Rev. 275, 291-97 (1962). As the *Salimoff* Court put it:

"'Recognition does not create the state.' (*Wulfsohn* v. *Russian S.F.S. Republic*, 234 N.Y. 372, 375.) It simply gives to a *de facto* state international status." 262 N.Y. at 226-27.

Thus, a foreign government is cognizable juridically even though it has not yet been formally recognized. See, *e.g.*, *Carl Zeiss Stiftung* v. *VEB Carl Zeiss, Jena*, 293 F.Supp. 892 (S.D.N.Y. 1968), *aff'd*, 433 F.2d 686 (2d Cir. 1970), *cert. denied*, 403 U.S. 905 (1971); *Wulfsohn* v. *Russian Socialist Federated Republic*, 234 N.Y. 372 (1923); *Upright* v. *Mercury Business Machines Co.*, 13 A.D.2d 36 (1st Dep't 1961). And our courts, implicitly acknowledging this on many occasions and in a diversity of contexts, have readily acknowledged the existence of *de facto* governments, albeit non-legitimatized, and have accorded full effect to the consequences of their governmental acts. See, *e.g.*, *Russian Reinsurance Co.* v. *Stoddard*, *supra*, 240 N.Y. at 158; *Salimoff & Co.* v. *Standard Oil Co.*, *supra*, 262 N.Y. at 227; see also Jaffe, *Judicial Aspects of Foreign Relations*, 149-51 (1933); Lubman, *supra*, 62 Colum. L.Rev. at 292.

That the courts have done so has never been thought to impede the executive's exercise of its foreign affairs powers. After all, once one admits (what one can hardly deny) that a foreign government, although not yet recognized, is capable of engaging in commercial transactions and of holding property in its name, it makes no sense and serves no purpose to prevent that government from suing to enforce rights arising from such transactions and the holding of such property. See Lubman, *supra*, at 306-08. To permit it to sue in such cases is to acknowledge only that it exists, not that it is a legitimate sovereign in the community of nations.[5]

[5] The case might well be otherwise where a rival party recognized by the executive asserts that *it* is the government of the

The rule which would exclude the unrecognized government from the courts in every case appears first to have been announced during the anti-Soviet hysteria of the 1920's, in *Russian Socialist Federal Soviet Republic* v. *Cibrario,* 235 N.Y. 255 (1923). Several later decisions accepted the rule uncritically. But *Cibrario* inspired almost universal adverse, and we believe quite warranted, criticism. See, e.g., Lubman, *supra,* at 299; Borchard, *supra,* at 266, Dickinson, *supra,* at 123; Jaffe, *supra,* at 149-156; Frankel, *The Juristic Status of Foreign States, Their Property and Their Acts,* 25 Colum. L. Rev. 544 (1925); Doukas, *The Nonrecognition Law of the United States,* 35 Mich. L. Rev. 1071 (1937). And courts, resorting to fictions and procedural technicalities, strained to avoid the harshness of the rule. See, e.g., *Russian Government* v. *Lehigh Valley R.R.,* 293 Fed. 135 (S.D.N.Y. 1923); *Lehigh Valley R.R.* v. *State of Russia,* 21 F.2d 396, 401 (2d Cir. 1927), *cert. denied,* 275 U.S. 571 (1927); *Amtorg Trading Corp.* v. *United States,* 71 F.2d 524 (C.C.P.A. 1934); *The Maret,* 145 F.2d 431 (3rd Cir. 1944); see also, *Russian Volunteer Fleet* v. *United States,* 282 U.S. 481 (1931). Moreover, the rule in *Cibrario* is the very one which the *Sabbatino* court suggested needed rethinking. 376 U.S. at 411, n. 12.

There may be situations where if a court were to permit an unrecognized government to sue it might unavoidably be expressing judgment on its legitimacy as sovereign. That might occur, for example, where two parties claimed to be the government for the particular territory, and only one of them had been recognized by the executive branch, see, e.g., *Bank of China* v. *Wells Fargo and Union Trust Co.,* 92 F.Supp. 920 (N.D. Cal. 1950), *appeal dismissed,* 190 F.2d 1010 (9th Cir. 1951), *judgment entered,* 104

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territory in question and seeks, on its own behalf, to enforce the rights in issue. In such a case, denial of the right to sue to the unrecognized government might be justified. See *infra,* pp. 13-14.

F.Supp. 59 (N.D. Cal. 1952), *modified* 209 F.2d 467 (9th Cir. 1953); or where, as in the event of a civil war, the *de facto* existence of the suing government was not clearly provable. In the present case, however, no rival party recognized as such by the executive claims to be the legitimate sovereign for East Germany. Moreover, there can no longer be the slightest doubt that the GDR government exists, and that it governs in the area of East Germany.[6]

The district court read the *Sabbatino* opinion as "productive of a rule which would deny to the G.D.R. [and every other unrecognized government] the right to bring suit in our courts in an action like the one at bar" (*infra*, p. 10a). That is plainly to misread *Sabbatino*. The Court neither stated nor suggested any such rule. On the contrary, as already noted, it explicitly said that it was not intimating any view "on the possibility of access by an unrecognized government to United States courts". 376 U.S. at 411, n. 12.

Rather than suggesting an absolute bar to suit by an unrecognized government, the *Sabbatino* opinion declared that "the courts of this country should be closed to the

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[6] The Basic Treaty between the FRG and GDR governments, which became effective on June 21, 1973, declares the sovereignty, independence and autonomy of the German Democratic Republic and establishes diplomatic relations between the two German States and their governments. Seventy other states (including the United Kingdom, France and Japan) have established diplomatic relations with the GDR government. The GDR government is represented by a permanent observer in the United Nations. Its application for admission to plenary membership in the United Nations has been recommended for Assembly approval by unanimous vote of the Security Council (including the vote of the United States). In early August, representatives of the United States and GDR governments initiated formal discussions for the purpose of establishing diplomatic relations, and representatives of the United States government and the GDR government have since been conferring in East Berlin and in Washington regarding the establishment of formal relations between the two governments.

government of a foreign state . . . [only if] the underlying reason [for doing so] is one of national policy transcending the interests of the parties to the action . . ." 376 U.S. at 408. In rejecting the contention that the severance of diplomatic relations with the still recognized Cuban government was reason to deny that government the right to sue, the Court distinguished the situation from one of diplomatic nonrecognition, which it said had the "unique legal aspect" of signifying "this country's unwillingness to acknowledge that the government speaks as the sovereign authority for the territory it purports to control". 376 U.S. at 411. But the Court did not say that the unrecognized foreign government must be barred from suing in *every case*. It anticipated that each particular case would stand on its own legs, and that in every case the courts would weigh the underlying policy reasons, if any, for closing the courts to the foreign government suitor, against the interests of the parties in securing a judicial determination of their rights. The courts below, however, failed to strike such a balance.[7]

Respondent Elicofon has defended the decisions below as evidencing a "strict neutrality" in the conduct of foreign policy, in his view the exclusive domain of the executive branch. But it is obvious, of course, that refusing to permit Kunstsammlungen to secure an adjudication of its rights in the Duerer paintings is far from a neutral act. For, the decisions below relieve Elicofon from the burden of defend-

[7] Moreover, as Professor Falk cogently remarked, the holding in *Sabbatino* that no policy considerations justified barring the recognized Cuban government from suing is persuasive argument for according the right to sue also to unrecognized governments. For there is simply no reason, he presciently noted, "to treat Mao's China differently from Castro's Cuba in United States domestic courts merely because one government is unrecognized whereas diplomatic relations with the other have been severed". Falk, *The Complexity of Sabbatino*, 58 Am. J. Int'l. L. 935, 950 (1964).

ing against the claim asserted by the only party which alleges successorship to the owner of the paintings when they were stolen (that is, Kunstsammlungen).[8] And, by depriving it of any right to recover property, they penalize that party because of its relationship to the unrecognized GDR government, notwithstanding the fact that there is no evidence at all that in refusing to recognize the government the executive branch intended that it or its nationals suffer any penalty.[9] Whatever reasons may have moved the *Cibrario* court to punish the Bolshevik government during the hysteria of the 1920's, there is certainly no justification for penalizing the GDR government, whose application for United Nations membership the United States has supported and whose representatives are presently conferring together with ours for the early establishment of diplomatic relations between the two nations.

The only basis for the rulings below is a blind deference to imagined demands of executive power. Such an abdication of judicial responsibilities is most unfortunate and

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[8] Whatever the status of the FRG government may have been at the time this case was commenced, it unquestionably does not now assert rights on behalf of the people of East Germany or of the Weimar Museum. Such a position would be completely inconsistent with the June 1973 Basic Treaty between the FRG and GDR governments. See, *supra*, p. 14, n. 6. Moreover, the United States has never recognized the FRG government as having sovereign authority over East Germany. See Bathurst & Simpson, *Germany and the North Atlantic Community*, 206-07 (1956); *Contemporary Practice of the United States Relating to International Law*, 57 Am. J. Int'l L. 403, 410 (1963); see also, *Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena*, 293 F.Supp. 892, 912 (S.D.N.Y. 1968), *aff'd.*, 433 F.2d 686 (2d Cir. 1970), *cert. denied* 403 U.S. 905 (1971); *Upright* v. *Mercury Business Machines Co.*, 12 A.D.2d 36 (1st Dept. 1961).

[9] Rather, the refusal to recognize the GDR government was based on a deference to the earlier views of the FRG government; which, however, as we have indicated, has itself now recognized the legitimacy and sovereignty of the GDR government.

should be corrected by this Court. Professor Jaffe's admonition, we submit, is worthy of note and should be heeded:

> ". . . to make its [the unrecognized government's] rights turn on the 'attitude' of the foreign office is a dangerous principle. The arguments which make it applicable to non-recognition make it applicable to severance of diplomatic relations, to any case in which our foreign policy negatives the facts of 'comity'. There is nothing in the statutes, nothing in the nature of recognition as a process, which compels the result. It proceeds from an idea that where a case has a bearing on foreign affairs, the court must subordinate its ordinary procedures and adjust its decision to the supposed needs of the foreign office. It seems to us that the relation between the two departments should be one of *mutual* respect. To allow suit contradicts nothing that the Department of State has said or done, creates no conflict between the departments. If it places limits on the effectiveness of a particular foreign policy, that merely testifies that the claims of foreign policy are no more absolute than any other." (Jaffe, *Judicial Aspects of Foreign Relations* 155-56 (1933))

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There is an additional feature of this case, beyond the fact that it is one for an adjudication of property rights, which underscores the necessity for this Court's review on certiorari. That is the fact that Kunstsammlungen, not the unrecognized GDR government, is the suitor here.

As we have shown, there is only the remotest risk that if the GDR government were allowed to sue the executive's nonrecognition policy would be compromised, and its conduct of foreign affairs impeded. But to whatever extent

that minimal risk might justify excluding the *government* from the courts, it does not justify excluding a party other than the government. For, there is no risk of embarrassment to or conflict with the executive policy in such a case, and the considerations which supposedly underlie the rule are absent there.

Assuming some validity in the doctrine against suit by unrecognized governments, it unquestionably should be applied only where absolutely necessary and with extreme caution. To close our courts to any aggrieved person is repugnant to the basic tenets of our judicial system. To do so in any case in deference to the political branches is unavoidably in some measure to shirk judicial responsibility. And to do so in a case of this kind, where property rights are in issue, raises serious questions of substantive due process. Cf. *Russian Volunteer Fleet* v. *United States,* 282 U.S. 481 (1931).

It behooves the courts therefore, insofar as they choose to apply the exclusionary rule, to define its parameters narrowly. This contemplates, we submit, that the doctrine be limited to cases in which the unrecognized regime itself is the nominal party, unless there be a clear showing that permitting suit by the non-government party will seriously interfere with the executive's foreign affairs function.

There was no such showing here. True, an issue was raised as to Kunstsammlungen's relationship to the GDR government in Berlin. But that issue was only secondary and, more significantly, wholly unrelated to the validity of Kunstsammlungen's claim to the paintings. Whatever may be the relationship of Kunstsammlungen to the government, the executive branch could not conceivably be embarrassed by entertaining a suit by such an entity, an art museum, to recover paintings wrongfully appropriated from it.

The district court, having first concluded that a suit by the GDR government would have to be barred because its claim to the paintings "would, by definition, be a claim on behalf of the people it purports to govern" (*infra*, p. 10a), assumed that Kunstsammlungen's assertion of right was premised on such a claim also. But Kunstsammlungen did not rely on any such ethereal notions. It based its claim of title simply on successorship to the right, title and interest of the Weimar Museum, which admittedly was in possession of the paintings when they were stolen.

When it put the exclusionary rule into play by characterizing the claim to the paintings as one "on behalf of the [German] people," the district court in effect resolved the question of title to the paintings before any proof on that issue was adduced, thus prematurely reaching the merits of the controversy. The proper course was rather to permit Kunstsammlungen to sue, whatever its relationship to the GDR government; and then, if on the merits it were decided that the owner of the paintings was "the German people", at that point, and only then, to inquire into Kunstsammlungen's status. Only then would the question of its continued participation in the suit have become relevant.

Moreover, the evidence before the district court established that the relationship between Kunstsammlungen and the GDR government was so remote that it was clearly error to find that it was an "arm and agency" of that government.[10] This is not the place, however, to argue

[10] The uncontradicted proof demonstrated that insofar as the actual administration of Kunstsammlungen and the conduct of its affairs were concerned, its director acted on his own responsibility and without any prior consultation with or approval by the GDR government; that there had not been any contact with that government; and that the government never intruded in any way into its affairs. The district court indeed did not find that there was in fact any direct relationship between Kustsammlungen and the

the merits of that issue. Irrespective of its relationship with the GDR government, however, it is undisputed that Kunstsammlungen is a discrete legal entity engaged solely in the operation of an art museum, a function completely foreign to the traditional business of sovereign government. Like other museum enterprises, it maintains museum buildings and looks after the art collections they house; purchasing, selling, exchanging, lending and borrowing paintings and art objects, planning and conducting exhibitions and lectures, publishing catalogues and art books. It seems ludicrous to suggest that an entity engaged in such nongovernmental functions should be vested with the privileges and burdened with the infirmities of sovereignty, merely because it is related in some degree to an unrecognized foreign government.[11]

In short, because the unrecognized GDR government is itself not the nominal plaintiff here; because the plaintiff

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GDR government. It concluded only that the entity was nevertheless "an integral part of the central government" because (a) the GDR constitution and laws provided for a system of indirect controls by that government over local governments and enterprises, (b) the financing of Kunstsammlungen, albeit indirectly, depended on appropriations which that government made to the local political subdivisions of the State, and (c) under East German law Kunstsammlungen property was designated "people's property", rather than private property of the institution (*infra*, pp. 12a-14a).

[11] We know of no case where such an enterprise, however closely related to government, has been granted sovereign immunity or (except for the decisions below) barred from suing. On the contrary, several decisions strongly suggest that enterprises engaged in activity which is not traditionally the business of government, even though agencies of unrecognized governments, should not be denied the right to sue. See *Russian Volunteer Fleet* v. *United States*, 282 U.S. 481 (1931); *United States* v. *The Home Insurance Co.*, 89 U.S. ((22 Wall.) 99 (1875); *Amtorg Trading Corp.* v. *United States*, 71 F.2d 524 (C.C.P.A. 1934); *Amtorg Trading Corp.* v. *New York Indemnity Co.*, 256 N.Y. 671 (1931); *Upright* v. *Mercury Business Machines Co.*, 13 A.D. 2d 36, 39 note, 41 (1st Dep't 1961).

is Kunstsammlungen, an entity engaged in activities which are far removed from the usual affairs of government; and because preventing it from suing to recover property stolen from it poses grave questions of due process: because of all these factors, the doctrine barring suit in our courts by unrecognized governments should certainly not have been applied here, whatever justification there may be for its use in other cases. The decisions below are a miscarriage of justice, which we respectfully submit this Court should set right.

II

The holding that Kunstsammlungen may not sue violates the 1923 treaty provisions guaranteeing German juristic entities access to the courts of the United States and is in conflict with decisions of this Court.

Certiorari should be granted here also because the decisions below, in refusing to honor provisions of the 1923 Treaty between the United States and Germany, disregarded and erroneously construed decisions of this Court.

Article XII of the 1923 Treaty of Friendship, Commerce and Consular Rights between the United States and Germany (44 Stat. 2132 [1927], T.S. No. 725)[12] directs that juristic persons organized under the laws of each of the contracting powers "shall enjoy free access to the courts of law and equity" of the other "for the prosecution . . . [and] for the defense of rights in all the degrees of jurisdiction established by law".[13]

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[12] Article XII is printed as Appendix A, *infra*, p. 1a.

[13] Although the English text reads, "[l]imited liability and other corporations and associations, whether or not for pecuniary profit"; the German text is, "Juristische Personen des Privatrechts mit oder ohne Haftungseinschraenkung" ("Juristic persons under civil

The executive branch has consistently taken the view, and this Court has held, that the 1923 Treaty survived the war and remains applicable to the area of East Germany. *Zschernig* v. *Miller,* 389 U.S. 429, 449 (1968) (Harlan, J. concurring); *Clark* v. *Allen,* 331 U.S. 503, 513-14 (1946).

Although Kunstsammlungen is an entity within the scope of Article XII, the district court refused to grant it access to our courts because, since (as the court found) it was an "arm" of the GDR government, enforcement of the Treaty mandate "would be highly inconsistent with expressly formulated national policy" (*infra,* p. 15a). And *Clark* v. *Allen, supra,* the district court said, "clearly indicated that our courts should not enforce treaty provisions where to do so would defeat our Government's foreign policy objectives" (*infra,* p. 15a).

Aside from the fact, as we have shown in Point I, that the executive's nonrecognition "policy objectives" could not possibly be defeated by permitting Kunstsammlungen to sue to recover the Duerer paintings, the 1923 Treaty provisions may not so cavalierly be ignored. As this Court has repeatedly held, treaty obligations are "the law of the land", *Foster* v. *Neilson,* 2 Pet. 253, 314 (1829), and once undertaken they become "compulsory upon all courts of the United States", *Bell* v. *Clark,* 437 F.2d 200, 203 (4th Cir. 1971); see also, *Hines* v. *Davidowitz,* 312 U.S. 52 (1941); *Missouri* v. *Holland,* 252 U.S. 416 (1920). Refusal to enforce Article XII might be justified on a showing that the

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law with or without limited liability"). The Treaty provisions are thus applicable to all juristic entities. See Restatement (Second), Foreign Relations Law § 147, Comment d(i) at 454 (1965).

Article I of the Treaty similarly provides:

> "The nationals of each High Contracting Party shall enjoy freedom of access to the courts of justice of the other on conforming to the local laws, as well for the prosecution as for the defense of their rights, and in all degrees of jurisdiction established by law."

Article was suspended, terminated or modified; or, as reasonably interpreted, inapplicable to instrumentalities of an unrecognized government. But there was no such showing here; and the decisions below do not depend on any such finding.

The *dictum* in the *Clark* v. *Allen* opinion, 331 U.S. at 508-09, on which the district court relied (*infra*, p. 15a), certainly does not sanction disregard or suspension of treaty provisions by reason of Presidential (let alone State Department) pronunciamentos, at least in conditions short of wartime emergency. Treaty provisions are binding as a consequence of joint action by the President and the Senate, and they may not be suspended, terminated or otherwise abrogated by declaration of the President alone. And Justice Douglas never suggested that the courts' duty to enforce treaty provisions could be made to depend on the vagaries of Presidential or State Department policy. He was deciding only the issue of what effect war has on treaty obligations, and in the *dictum* in question he merely summarized the view Judge Cardozo had expressed on that limited question in *Techt* v. *Hughes*, 229 N.Y. 222 (1920), *cert. denied* 254 U.S. 543 (1920), which (as Justice Douglas said) "we believe to be the correct one".[14]

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[14] The State Department expressed the view below that although the 1923 Treaty still applies to the area of East Germany, Article XII does not require that an instrumentality of the GDR government, regardless of its juridical form under the laws of East Germany, be permitted to sue in United States courts. Although State Department views on treaty interpretation are entitled to consideration, they certainly are not binding on the courts; and the weight accorded them will vary depending on the extent to which the question in issue affects the conduct of international affairs. See Restatement (Second), Foreign Relations Law § 152, Comments a to c (1965); Moore, *The Role of the State Department in Judicial Proceedings*, 31 Fordham L.Rev. 277, 293-94, 299 (1962). There was no showing that the question in this case had more than the slightest effect, if any at all, on international relations.

III

The holding refusing to permit Kunstsammlungen to sue in light of the Executive's position that the USSR government was the sovereign power in East Germany and the GDR government merely its agent incorrectly decided an important question of federal law.

We argued below, in the alternative, that since the executive branch regarded the USSR government as the sovereign power in East Germany and the GDR government as merely its instrumentality, Kunstsammlungen, even though it were found to be an "arm" of the GDR government, was nevertheless entitled to sue nevertheless as an agency, albeit indirectly, of the *recognized* USSR government. The district court ignored our argument. The court of appeals rejected it (*infra,* p. 5a).

There is no doubt that our executive took the view that "sovereign power in East Germany has [since 1945] been exclusively exercised by the Soviet Union through its agency or instrumentality, the government of East Germany. . . ." *Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena,* 293 F.Supp. 892, 912 (S.D.N.Y. 1968), *aff'd.,* 433 F.2d 686 (2d Cir. 1970), *cert. denied,* 403 U.S. 905 (1971); see also, *Upright* v. *Mercury Business Machines Co.,* 13 A.D.2d 36, 42, 213 N.Y.S.2d 417, 423 (1st Dep't 1961); *Contemporary Practice of the United States Relating to International Law,* 57 Am. J. Int'l L. 403, 410 (1963); Department of State Background Notes, East Germany (Soviet Zone), Department of State Publication 7957 (January 1971), p. 7.

That was the view also of the British government before it recently recognized the GDR government as sovereign. *Carl-Zeiss-Stiftung* v. *Rayner and Keeler, Ltd.*

[1966] 2 All E.R. 536, 578 (H.L.). And the House of Lords, in the *Zeiss* case just cited, adopted the very same position we urged below. It held that the political subdivision of the GDR government involved in that case, the Council of Gera, must be deemed an organ established under the laws not of the unrecognized GDR government, but rather of the recognized USSR government, acting through the GDR regime as its subordinate agent (*Id.* at 548). Similarly, Kunstsammlungen, if indeed it be a government agency, must also be regarded an agency of the USSR government.

Admittedly the position which we assert is founded on a fiction, even as was the House of Lords ruling. But accepting it would permit the courts to assure Kunstsammlungen an adjudication of its property rights without having to confront the delicate international and constitutional law questions which application of the nonrecognition doctrine presents. And the fiction certainly is no more repugnant than the fictions inherent in the views that the GDR regime still remains today a non-legitimate government and that to permit Kunstsammlungen to sue will embarrass the executive. Moreover, in light of the unprecedented and confusing posture of post-war Germany, the position we urge would furnish a most sensible method for resolving the thorny problems its status poses. To paraphrase a comment on somewhat similar questions presented in the *Zeiss* cases: "[T]he most desirable result would be that both parties [the East German party, sought to be barred because of the nonrecognition of the GDR government, and the West German party] have an unrestricted opportunity to present their case on the merits, and surely that could not be a disaster for anyone." Comment, *A Divided Country in Foreign Courts—Recent Litigation Involving Germany's Legal Status and the Zeiss Stiftung*, 65 Mich. L. Rev. 924, 943 (1967). Justice and fairness plainly commend that course.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

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